UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOSEPH HARDESTY, et al., Individually and on behalf of All Others Similarly Situated Plaintiffs, v. **THE KROGER CO., et al.,** Defendants.	: : : : : : : : : : :	Case No. 1:16-cv-00298 Judge Timothy Black **PLAINTIFFS' MOTION FOR CLASS CERTIFICATION UNDER FED. R. CIV. P. 23(a) and 23(b)(3)**

Now come Plaintiffs Joseph Hardesty, Madeline Hickey, and Derek Chipman ("Named Plaintiffs"), individually and on behalf of all putative class members, and hereby move this Court for class certification of their Ohio wage claims (Counts II-IV of the Complaint) pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3). The Named Plaintiffs and the putative class members they seek to represent have a sufficiently defined class of which they are members, meet Rule 23(a)'s four initial prerequisites of numerosity, commonality, typicality, and adequacy of representation, and, most importantly, meet Rule 23(b)(3)'s requirements that (i) a common question of fact or law predominates over any questions affecting individual members, and (ii) a class action is superior to other available methods for fairly and efficiently adjudicating this case. As such, the Named Plaintiffs respectfully request that this Court:

a. Certify their Ohio wage claims set forth in the Complaint pursuant to Fed. R. Civ. P. 23;
b. Approve the attached notices to be sent to the Ohio class;
c. Require that Defendant Kroger supplement the putative class member list previously produced with any updated contact information, together with any additional individuals who have since become employed as CoRE Recruiters;
d. Award all other relief related to this motion that is proper.

A Memorandum in Support with Table of Contents and Summary of the Argument, Affidavit of Joshua M. Smith, Esq., Counsel for Named Plaintiffs (**Exhibit A**), Affidavits of Proposed Class Counsel (**Exhibit B-D**), Prior Declarations of Putative Class Members (**Exhibits E-L**), and Proposed Notice forms (**Exhibit M**), are attached.

Respectfully submitted,

/s/ Peter A. Saba

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SUMMARY OF THE ARGUMENT

Courts, including this one, routinely certify wage misclassification cases with similar common questions, given that the *central question* of whether employees were wrongfully classified as exempt from overtime pay requirements is common to the class." *See Swigart v. Fifth Third Bank*, 288 F.R.D. 177, 184; 2012 U.S. Dist. LEXIS 182602 **15 (S.D. Ohio 2012)(emphasis added)(collecting cases from various circuits which have certified misclassification actions); *Hendricks v. TQL* 292 F.R.D. 529, 543 (S.D. Ohio 2013)(finding common questions to clearly predominate where the common contentions of a subclass are whether the class members primarily perform work directly related to the management or general business operations of defendant or its customers, and whether class members exercised discretion and independent judgment with respect to matters of significance); *Hurt v. Commerce Energy*, 2013 U.S. Dist. LEXIS 116383 at *16 (N.D. Ohio 2013)("the Plaintiffs have shown, with Just Energy's own documents, that Just Energy has state-wide policies that a jury could find are inconsistent with exempt, independent contractors.").

Such is the case here. Defendants The Kroger Co. and Kroger GO, LLC ("Defendant" or "Kroger") violated Federal and Ohio law from 2014 until December 1, 2016,[1] during which time it implemented a general, uniform policy of classifying its 180 "Recruiters" at its Center of Recruiting Excellence ("CoRE"), a single call center in Blue Ash, Ohio, as exempt from the overtime requirements of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* ("FLSA") and the Ohio Minimum Fair Wage Standards Act, O.R.C. §§ 4111.01, *et seq.* ("OMFWSA"). Kroger has alleged that such employees fell under the "administrative exemption" of the FLSA and Ohio law during that time period, 29 CFR § 541.200 *et seq.*, while the Named Plaintiffs contend that

[1] On December 1, 2016, Kroger correctly re-classified all CoRE Recruiters to FLSA "non-exempt" status, and began paying recruiters on an hourly basis including overtime for hours worked in excess of 40 hours per week.

this exemption never applied, and that CoRE Recruiters should have been paid on an hourly basis including overtime for all hours worked in excess of forty (40) hours per week. Because a decision by this Court regarding whether Kroger's uniform treatment of CoRE Recruiters as "exempt" violates the FLSA and Ohio law will resolve an issue central to the validity of the Named Plaintiffs and the class they seek to represent' s claims, certification is proper.

I. Named Plaintiffs meet the requirements of Fed. R. Civ. P. 23(a) and (23(b)(3)).

As more fully set forth below, the Named Plaintiffs meet all requirements for class certification under Fed. R. Civ. P. 23(a) and 23(b)(3). Initially, the putative class presents a sufficiently defined class (i.e., all CoRE Recruiters who worked in excess of 40 hours per week from the start of CoRE's operations in 2014 until December 1, 2016), of which the Named Plaintiffs are members. *See Tedrow v. Cowles,* S.D.Ohio No. 2:06-cv-637, 2007 U.S. Dist. LEXIS 67391, at *13 (Sep. 12, 2007)("A threshold issue that is implicit in a Rule 23 inquiry is that a court conclude that the named plaintiffs seeking certification propose an identifiable, unambiguous class in which they are members."). Thus, the implicit requirements of Rule 23 are met.

A. Rule 23(a) Prerequisites—Numerosity, Commonality, Typicality, and Adequacy of Representation

Next, the Named Plaintiffs and putative class meet the four explicit requirements of Rule 23(a), which are that (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy of representation).

1. Numerosity

First, the class of 180 or more current and former CoRE Recruiters is sufficiently numerous, such that joinder is impracticable. *See, e.g., Laichev v. JBM, Inc.*, 269 F.R.D. 633, 640 (S.D. Ohio 2008)(joinder of at least 90 individuals lawsuits--which could include in reality include many more--deemed impractical); *Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 105 F.R.D. 506, 508 (S.D. Ohio 1985)(finding that independent subclasses consisting of 87 and 23 investors each met the numerosity requirement, stating there was "no reason to encumber the judicial system with 23 consolidated lawsuits when one will do."). Moreover, the fact that many of the individual class members are current employees of Kroger also renders joinder impracticable, given that such members are unlikely to file individual lawsuits due to fear of retaliation. *Swigart*, 288 F.R.D. at 183 ("In employment class actions like this one, a class member's potential fear of retaliation is an important consideration in deciding whether joinder is impracticable and thus whether the numerosity requirement is satisfied.").

2. Commonality

Second, the class has multiple common questions of law and fact, including in particular the central question of whether CoRE Recruiters were properly classified as exempt under the FLSA and OMFWSA pursuant to a uniform Kroger policy decision, based upon common anticipated job functions. *Swigart*, 288 F.R.D. at 183 *citing DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995)). ("Rule 23 is satisfied when the legal question linking the class members is substantially related to the resolution of the litigation."). This question, in addition to other common factual questions related to CoRE Recruiters job functions, establish commonality.

3. Typicality

Third, the Named Plaintiffs' claims are typical of the class claims, in that they all were subject to the same uniform policy decision by Kroger to classify them as FLSA exempt, were employed as CoRE Recruiters within the applicable time period, were subject to the same job description, subject to the same Kroger policies, procedures, and training, performed the same job duties, and worked in excess of 40 hours per week. *Hurt v. Commerce Energy, Inc.*, 2013 U.S. Dist. LEXIS 116383 at *12 (N.D. Ohio 2013) *citing Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007)("A claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory."). As such, the typicality element of Rule 23(a) is met.

4. Adequacy of Representation

Fourth, the Named Plaintiffs and their counsel are adequate representatives of the class, in that the Named Plaintiffs were subject to this same policy decision by Kroger, have no interests inherently antagonistic to the class, have vigorously prosecuted the interests of the class in submitting to discovery, including depositions, and will continue to do so at trial. *See Hendricks v. Total Quality Logistics, LLC*, 292 F.R.D. 529, 542 (S.D. Ohio 2013). (Rule 23(a)(4) calls for a two-pronged inquiry: "(1) the representatives must have common interests with unnamed members of the class, and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel.). Moreover, class counsel is sufficiently experienced and able to adequately represent the interests of the class, as more fully set forth in the attached Affidavits of Counsel (**Exhibits B-D**). Thus, adequacy of representation is met.

B. Rule 23(b)(3)—Question of Law or Fact Predominate, and Class Action is Superior to Other Available Methods

Finally, the Named Plaintiffs meet the requirements of Fed. R. Civ. P. 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *See also Tyson Foods, Inc. v. Bouaphakeo*, 194 L. Ed.2d 124, 134, 136 S.Ct. 1036, 2016 U.S. LEXIS 2134 (March 22, 2016)(When "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members."). As set forth above, the central question of whether CoRE Recruiters were properly classified as exempt from the FLSA and OMFWSA's overtime requirements pursuant to a uniform Kroger policy decision predominates over any questions affecting only individual members. Moreover, class action is the superior method for fairly and efficiently adjudicating this wage misclassification controversy, given (1) the relatively low amount of individual damages for particular class members, (2) a statute of limitations coming upon expiration for many class members, (3) a lack of any similar litigation by CoRE Recruiters; (4) that the majority of class members are located in this district; and (5) that all class members worked at a single location in this district. Because the Named Plaintiffs and putative class meet the requirements of Rule 23(b)(3), certification is proper.

C. Notice and "Request for Exclusion" forms for Rule 23 Class should be adopted

Because the Named Plaintiffs and the class they seek to represent meet all requirements for class certification under Fed. R. Civ. P. 23, they respectfully request that this court certify the class, approve the attached notice forms, and require Defendant to provide supplemental contact information of any and all class members.

MEMORANDUM IN SUPPORT

I. CLASS DEFINITION

The Named Plaintiffs move this Court under Fed. R. Civ. P. 23(a) and 23(b)(3) to certify the following Ohio class:

> All employees classified as recruiters, who; i) were employed at Kroger's Center of Recruiting Excellence ("CoRE") in Blue Ash, Ohio, at any time from the beginning of the CoRE's operations in 2014 to December 1, 2016, and ii) worked in excess of forty (40) hours during any given workweek. [2]

As former CoRE Recruiters who worked in excess of forty (40) hours a week during the requisite time period, Named Plaintiffs Joseph Hardesty, Madeline Hickey, and Derek Chipman are all members of this proposed class.

II. FACTUAL BACKGROUND

A. Kroger's Center of Recruiting Excellence ("CoRE")

This case concerns approximately 180 or possibly more[3] current and former employees of Kroger, who worked at a Kroger call center location in Blue Ash, Ohio, labeled the "Center of Recruiting Excellence" ("CoRE"). (*See Hardesty v. Kroger* Putative Class List and Supplemental Class List, attached as **Exhibit 1** to Affidavit of Joshua M. Smith). CoRE is located on the fifth floor of 9997 Carver Road, Cincinnati, Ohio 45242. (Schiff Dep. 12:10-11 taken pursuant to Fed. R. Civ. P. 30(b)(6)). The facility employs approximately 200 Kroger employees, with roughly 120 or more being labeled "Recruiters." (*Id.* at 20:21-21:5).

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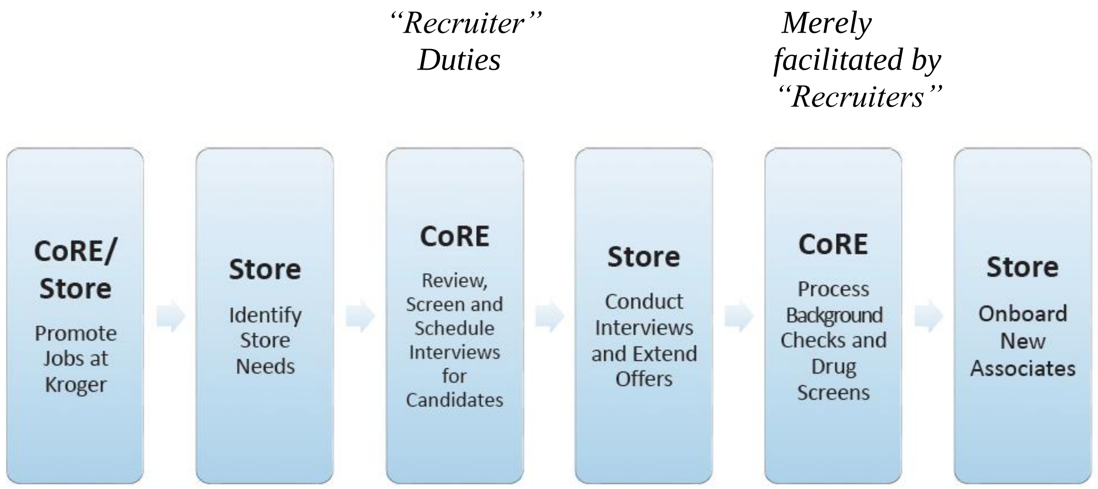
[2] All current and former Kroger employees which the Named Plaintiffs seek to represent with respect to their Ohio wage claims were employed by Kroger at its CoRE Center in Blue Ash, Ohio. As such, the class definition stated in the FLSA certification order and the class members sought to be certified in this motion are the same.

[3] While 180 putative class members have been identified by Kroger in September 2016, it is possible that additional putative class members may have been hired since that time, or were not included on Kroger's putative class lists.

B. CoRE's Proof of Concept Phase

According to Kroger, the CoRE facility began as a proof of concept in June of 2014, in which a group of contract employees, paid on an hourly basis, tested the CoRE recruiting "process" for multiple Kroger divisions. (*Id.* at 16:21-24). This "process," according to CoRE training documents, is as follows:


"Recruiter" Duties
Merely facilitated by "Recruiters"
CoRE/ Store
Promote Jobs at Kroger
Store
Identify Store Needs
CoRE
Review, Screen and Schedule Interviews for Candidates
Store
Conduct Interviews and Extend Offers
CoRE
Process Background Checks and Drug Screens
Store
Onboard New Associates

(*Id.* at 98:17-23 and **Exhibit 2** to Smith Affidavit). As indicated in the training documents, the process specific to CoRE is to "review, screen, and schedule interviews for candidates[,]" while the identification of store needs, actual interviews, hiring decisions and extending of offers is made at the store level. (*Id.* at 99:3-13 and **Exhibit 2** to Smith Affidavit). With respect to "process[ing] background checks and drug screens" Kroger concedes Recruiters do not actually perform such checks or screens, but would merely facilitate the process. (*Id.* at 100:6-15).

From approximately June 2014 through September 2014, Kroger utilized approximately 15 contract employees to test the CoRE Process in its Mid-Atlantic and Southwest Divisions. (*See* Defendant's Response to Interrogatory No. 15, attached as **Exhibit 3** to Smith Affidavit; Hickey Dep. 39:11-13; 45:16-46:3; Moffett Dep. 15:15-16:13). These employees, labeled as contract "Recruiters," performed some of the same duties that the CoRE Recruiters currently do, calling candidates and scheduling the same for in-store interviews. (Hickey Dep. 47:18-21). The contract "recruiters" were paid during that time on an hourly basis, including overtime for all hours worked over 40 per week. (Moffett Dep. 18:5-16).

C. Kroger makes a uniform policy decision to classify CoRE Recruiters as FLSA Exempt

Sometime in late 2014 prior to hiring its first CoRE employee, the CoRE General Manager, Buck Moffett, made a uniform determination that CoRE Recruiters should be classified as exempt under the FLSA:

> Q. Did you eventually make a determination that the recruiters at CoRE should be treated as exempt from the Fair Labor Standards Act and applicable state law; is that correct?
>
> A. Yes.
>
> Q. Okay. When did you make that determination?
>
> A. I don't recall the specific timing.
>
> Q. What is your understanding of what that determination means?
>
> A. So it's my understanding that that determination meant that their job duties would allow us to – would allow us to have them exempt from overtime, based on Fair Labor Standards Act.
>
> Q. So it would be fair to say that those employees could work more than 40 hours in one week, but would not be entitled to additional pay for working more than 40 hours in one week; is that correct?
>
> A. Yes.
>
> Q. And when you made that determination, you made that as to all recruiters at CoRE; is that correct?
>
> A. Yes.

(Moffett Dep. 48:8-49:8).[4] In doing so, Moffett indicated he "took partnership" with the Kroger legal team and the human resources team. (*Id.* at 33:14-20). He specifically sought their opinions based on the "duties I saw the recruiters having, asked for their partnership." (*Id.* at 33:21-24). The "duties" that Mr. Moffett envisioned of the position were very simply to "ensure that the person that they are forwarding to the store meets our expectations for someone that would interact with our customers." (*Id.* at 39:24-40:6; *See also* 20:22-21:6).

In addition to his overall vision of CoRE Recruiters' duties, Mr. Moffett also relied upon a single Corporate Position Profile (i.e., a job description) which he "revised" from previous versions drafted, and also provided to Kroger's counsel in determining CoRE Recruiter's exempt status. (*Id.* at 32:20-33:10; *See also* 39:4-13; *See also* "Recruiter Corporate Position Profile" attached as **Exhibit 4** to Smith Affidavit). Mr. Moffett used this single position profile, applicable to all CoRE Recruiters, in order to determine that the CoRE Recruiters should be made "FLSA Exempt." (*Id.* at 62:11-63:22; *See also* 81:12-82:3; Schiff Dep.54:2-9).

This corporate position "profile" Mr. Moffett created lists the following position summary for all recruiters:

> The Recruiter will be part of a dedicated recruiting team providing our grocery retail stores with best-fit candidates for hourly store positions. The Recruiter will assess and screen applications, conduct phone screens, prepare interview packages, and present stores with a qualified slate of applicants. The Recruiter will also be responsible for ensuring candidates and store teams have positive recruiting experiences by keeping them informed throughout the process and answering their questions. Role model and demonstrate the company's core values of respect, honesty, integrity, diversity, inclusion and safety of others.

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[4] While Moffett was not clear what exemption (if any) Kroger believed the CoRE Recruiters would fall under at that time, Kroger has claimed in this lawsuit that the employees fall under the "administrative exemption" to the FLSA and Ohio state law. (*See* Defendant's Response to Plaintiffs' Motion for Conditional Certification of Collective Action, fn. 1, Doc. 13). This exemption found under 29 CFR § 541.200 *et seq.*

(**Exhibit 4** to Smith Affidavit). The profile also lists the following "essential job functions" for Recruiters:

- Screen candidate applications using best-fit criteria such as availability and behavioral assessment
- Conduct phone screens to confirm interest and availability and share information about the position
- Proactively manage communications with candidates and stores, keeping individuals informed and engaged throughout the recruitment process
- Act as a steward of positive candidate experience
- Work closely with other members of the recruiting team to ensure all applicant information is updated in the Applicant Tracking System (ATS), and communicated to candidates in a timely fashion
- Review background checks and determine appropriate disposition of candidates
- Support high-volume recruiting events to assist new store openings and remodels/expansions
- Stay up-to-date on retail industry, employment trends and hourly associate practices, to effectively anticipate and address changes that could impact applicant availability, sourcing and recruiting
- Comply with applicable federal and state laws and company standards regarding recruiting practices
- Help continuously assess and improve time-to-fill, quality of hires, and candidate experience
- Must be able to perform the essential functions of the job with or without reasonable accommodation.

(*Id.*).

Beyond creating his own version of the corporate job profile, Mr. Moffett alleges he also engaged in consultations with Kroger's in-house counsel, Beau Sefton, and a Kroger Human Resources Generalist, Sean Kelter. (Moffett Dep. 39:4-23; 49:5-8). The only information that Moffett provided to Sefton for purposes of making the universal decision that all CoRE Recruiters should be treated as exempt was: i) the sole job description prepared by Moffett which applied to all CoRE Recruiters; and ii) and the "overall duties for the role CoRE Recruiter, which was Moffett's vision for the role of CoRE Recruiter and how the CoRE Recruiters would conduct their job duties on a daily basis. (Moffett Dep. 39:4-23; 49:5-8).

D. Kroger hires its first FLSA Exempt CoRE Recruiters in October 2014

According to Kroger's records, the company hired its first CoRE Recruiter, Madeline Hickey, on October 31, 2014. (*See* **Exhibit 1** to Smith Affidavit). FLSA Opt-In Plaintiffs Kimberly Burchett and Sara Raney Schumann were hired shortly thereafter, on November 3, 2014. (*Id.*). By the end of 2014, Kroger had hired on approximately 15 CoRE Recruiters. (*Id.*).

From October 31, 2014 until December 1, 2016, all CoRE Recruiters continued to be uniformly classified as FLSA Exempt based upon the decision of Buck Moffett. (Schiff Dep. 54: 14-25).

E. The "Recruiting Script" and Three Screening Questions

Sometime in the fall of 2014, a "Recruiting Script" was put into place for all CoRE Recruiters to follow in making screening calls to online applicants. (Williams Dep. 76-77:7-25; 1-2; Whitlow Dep. 20:8-14, 30:11-13; *See also* "Recruiting Script" attached as **Exhibit 5** to Smith Affidavit). This script provided a complete walkthrough of the items to convey to an online applicant during a phone screen, including detailed instructions with respect to (1) Introduction and Position details; (2) Screening Questions; (3) Scheduling an Interview; and (4) Declining a Candidate. (*Id.*). While the script was revised in form over time at CoRE, the portion of the script regarding screening questions consistently requested the following information:

1. What is it about working at (Banner Name) that interests you the most?
2. As a (Position Title), what specific things would you do or say in order to provide friendly customer service to our customers?
3. Can you tell me about a work or academic related experience that you are most proud of?

(*Id.*; *See also* Chipman Dep. 170:2-21).

As long as a candidate provided minimal answers to these questions, Recruiters would generally schedule the applicant for an interview. (Whitlow Dep. 17:16-22; Chipman Dep. 171-

172:4-25, 1-15; Hickey Dep. 55-56:19-25, 1-21; Hardesty Dep. 80-81:15-25, 1-6). In fact, CoRE Recruiters from multiple teams testify that they would send nearly any applicant to an in-store store interview, so long as provided any answer to the questions, and were not rude or did not swear on the phone. (Rutledge Dep. 75:11-17; Ward Dep. 42:14-19). Kelly Rutledge, an Opt-In Plaintiff, estimated that she sends 97% of applicants she screens to an in-store interview. (*Id.* at 74:10-75:10).

F. CoRE (1) moves to its current location on Carver Road, and (2) hires waves of CoRE Recruiters which undergo a common orientation and training process

At approximately the end of 2014, CoRE moved to its current facility on Carver Road in Blue Ash, Ohio. (Moffett Dep. 84:5-21). Shortly thereafter in February 2015, CoRE hired a wave of approximately 40-60 Recruiters, including Named Plaintiffs Joseph Hardesty and Derek Chipman, and FLSA Opt-In Plaintiffs Jessica Conroy, Rhonda Furr, Amanda Gayhart, Jeremy Hadden, LaWanna Haskins, Michael Kovatch, Ckris Matibiri, Latasha Moore, Kelly Rutledge, and Matthew Taske. (*See* Smith Affidavit, **Exhibit 1**; Kroger Response to Interrogatory 14 in Case No. 1:16-cv-00368, attached as **Exhibit 6** to Smith Affidavit; Hardesty Dep. 27-28:19-25, 1-6;). This wave of CoRE Recruiters underwent a uniform five week orientation and training process, consisting of classroom-type training, PowerPoint presentation, learning the roles of the job, and the CoRE system to be used as Recruiters. (Hardesty Dep. 28:1-17).

An additional wave of approximately 44 CoRE Recruiters were then hired in March 2015, including FLSA Opt-in Plaintiffs Christian Bradley, Alexandra Cooper, Wahid Lewis, and Craig McIntire. (*See* Smith Affidavit, **Exhibit 1**). Based upon Kroger records, from March 2015 to at least December 2016, CoRE actively employed approximately 110-140 Recruiters at CoRE. (*See* Smith Affidavit, **Exhibit 1**; Schiff Dep. 20-21:16-25, 1-11).

The two waves of Recruiters each underwent a common training process, conducted by CoRE's Trainer at that time, Esther Mast. (Schiff Dep. 91:10-24; 95:20-96:7; Hardesty Dep. 27:19-29:8). All Recruiters were provided substantially provided the same training during that time period. (Schiff Dep. 95:25-96:9; *See also* 122:21-123:15; *and* 141:17-142:7; *See also* CoRE New Hire Training Session Module 1, attached as **Exhibit 7** to Smith Affidavit).

CoRE Recruiters were also subject to the same Kroger policies and procedures. First, CoRE Recruiters utilized the same knowledge management system in looking at various position openings for a division. (Schiff Dep. 167:10-168:11). Recruiters also used the same applicant tracking system, titled "KnowMe." (Schiff Dep. 207:18-208:25). In calling candidates for screening, Recruiters would also use the same Avaya phone system, and the same "Recruiting Script" provided by Kroger. (Schiff Dep. 159: 6-11;160:18-20; 227:15-20; Whitlow Dep. 16:6-11; Victoriano Dep 18:16-23). CoRE Recruiters were also subject to the same General Office (GO) Employee Handbook. (Victoriano Dep. 31-32: 9-25; 1-15). CoRE Recruiters were also readily able to switch recruiting divisions/teams within CoRE, with entire divisions/teams combining with other divisions/teams to cover any shortfalls in the scheduling of interviews. (Moffett Dep. at 128: 4-14). Finally, as stated above, CoRE Recruiters were all subject to the same Kroger corporate position profile outlining their "essential job duties." (Schiff Dep. 54:1-11)

G. CoRE Recruiters spent the vast majority of their work days reviewing online applications and performing routine screening and scheduling calls

Despite their "recruiter" job title, the CoRE Recruiters did no actual recruiting as that term is commonly used. Instead, these "recruiters" primarily reviewed online candidate applications, performed routine screens of candidates using recruiting "script," and properly scheduled the applicant for an in-store interview. (Victoriano Dep. 17:10-18:15; Hickey Dep. 47:18-21; 52: 12-

19; Whitlow Dep. 15:9-16:20; Ward Dep. 33:1-11). Kroger's training documents are consistent with this, indicating that all CoRE Recruiters provide three main duties:

What are a Recruiter's 3 main duties?
Review Candidate's Applications
Phone Screen Candidates and Schedule Interviews
Forward Candidates to Store Specific Job Requisitions

(*See* pg. 18 of **Exhibit 7** to Smith Affidavit; Schiff Dep. 102-103: 13-25, 1-9).

Evidence also shows that the CoRE Recruiters spent a vast majority of their work day being logged into the Avaya phone system, screening and scheduling online applicants for in-store interviews, and scheduling them for in-store interviews. Kroger's own "aux" phone records, which purport to show the time a recruiter is logged into Kroger's Avaya Phone System, show that every workweek, nearly all Recruiters spend 80-90% or more of their scheduled work week on "recruiting time," meaning they are in the phone loop making outbound or receiving inbound calls from online applicants. (*See* Aux Phone Records for July 20, 2015-December 1, 2016, attached as **Exhibit 8** to Smith Affidavit).

The CoRE Recruiters exercised no discretion with respect to determining which employees would actually be hired for particular positions. (Schiff Dep. 12-13:25, 1-4; Moffett Dep. 20:14-20; 66:10-67:13). This was a duty reserved for the local hiring representative. (*Id.*). The CoRE Recruiters also did not discuss qualifications of the candidates with the individuals who made the hiring decisions. (Moffett Dep. 66:10-67:13). As stated above, the CoRE Recruiters' main duties were to call an applicant, ask three pre-established questions, fill an interview time slot at a local store, and repeat this process over and over throughout their work day.

Prior to making screening calls, the CoRE Recruiters would generally review an applicant's online job application, including their availability, whether they met minimum age requirements, and positions to which they had applied. (Hickey Dep. 87:8-21; Chipman Dep. 138:1-17; Hardesty Dep. 85:19-86:8; Gayhart Declaration ¶ 16-17; Bradley ¶ 14-15; Kovatch ¶ 16-17; Elkins-Schumann ¶ 18-19). Once a recruiter had determined an applicant's availability, that they met age requirements, and jobs to which they had applied, they would call the applicant to screen them and schedule an interview.

The vast majority of the time, CoRE Recruiters would schedule the applicant for an in-store interview following a phone screen. (Rutledge Dep. 74:16-20; Ward Dep. 34:17-21; Hickey Dep. 53:9-22). In fact, CoRE Recruiters specifically indicated that they would send along candidates as long as they provided some minimal answer, and were not rude, or did not swear on the phone. (Burchett 63:13-25; Rutledge Dep. 75:11-17; Ward Dep. 42:16-24; Hardesty 80:15-25; Hickey Dep. 55:10-24). This was in part because CoRE Recruiters were directed by management to schedule interviews if applicants provided such minimal answers. (Hardesty Dep. 80:15-25; Burchett Dep. 63:13-64:4; Hickey Dep. 56:17-57:2). Further, CoRE Recruiters were required to make a minimum number of calls, and schedule a minimum number of interviews per day. (Whitlow Dep. 30-31: 18-25, 1-7; Williams Dep. 40:3-16; Ward Dep.28:23-29:16; Sara Rainey Resignation Letter, attached as **Exhibit 9** to Smith Affidavit; E-mails from Supervisors regarding Standards, attached as **Exhibit 10** to Smith Affidavit; Rutledge Dep. 73:9-18). Numerous CoRE Recruiters received "coachings" by their supervisors when they did not meet the required numbers out outbound calls made or interviews scheduled. (*See* Ashley Frank notes re Jalen Johnson Productivity, attached as **Exhibit 11** to Smith Affidavit; Travis Banner coaching document re Sara Rainey interviews, attached as **Exhibit 12** to Smith Affidavit).

H. CoRE Recruiters are divided into teams based primarily upon geographic region and/or Kroger subsidiary

Recruiters at CoRE are divided into approximately 19 teams based on the geographic region and/or subsidiary of Kroger that they were supporting (i.e., Southwest, Atlantics, Ralph's, Mass Hire, etc.). (Kroger Response to Interrogatory 9, attached as **Exhibit 13** to Smith Affidavit; "CoRE Org Chart" dated 12-05-16, attached as **Exhibit 14** to Smith Affidavit). As stated above, despite such division, the recruiters would frequently assist or support other teams. (Hardesty Dep. 31-32:21-25, 1-19; Chipman Dep. 79:2-11; Moffett Dep. 128:4-14; Ward Dep. 26:10-27:11). This required little to no training on the processes of such other teams because, as stated above, all teams followed the same general recruiting process in screening candidates and scheduling interviews.

I. With the knowledge and permission of Kroger management, CoRE Recruiters work substantial amounts of overtime

It was understood by the CoRE Management that the CoRE Recruiters would be working overtime whenever necessary. (Moffett Dep. 89:1-10). From the start of CoRE's operations, CoRE Recruiters were generally scheduled to work a 9.5 hour scheduled shift, Monday through Friday, with a one hour lunch break, amounting to a 42.5 hour work week. (*See* Team Schedule Examples, attached as **Exhibits 15-18** to Smith Affidavit).[5] However, it was understood that CoRE Recruiters were free to work whatever amount of overtime that may be necessary, both at the beginning or end of the day, in order to complete their job duties:

> A. So the guidance that we had on scheduling, as I recall, was that we would focus very heavily on times that the phones needed to be covered because they would be taking incoming phone calls.

[5] For the Court's convenience, Named Plaintiffs have only attached some examples of schedules depicting such 9.5 hour work days. Upon the Court's request, Named Plaintiffs will provide all schedules evidencing that this time period was generally consistent during CoRE's operations.

> **Recruiters had the ability to come in as early to prep as they needed to, or to leave afterwards at the time they needed to in order to be able to complete their duties.**
>
> I don't recall us specifically saying that you have to be -- if, you know, you start on the phone at 9:00, you have to be here at 8:00, for example.
>
> Q. That was left to the recruiter to determine how much time they need either at the beginning of the day or the end of the day to get their job duties done; is that correct?
>
> A. Yes.

(Moffett Dep. 93:3-20)(Emphasis Added). This was further confirmed by Daniele Williams, Manager of the Mass Hire Team at CoRE:

> Q. What do you mean, they managed their time?
>
> A. If a recruiter stayed late to work on a project, it wasn't necessarily because I – if we are talking mass hire – that I said, I need you to stay until 8:00 and finish this project.
>
> The recruiter may say – I don't know because I didn't manage it, but if they were staying, they could stay for five minutes, 15 minutes, an hour, two hours. I didn't manage it. I went home if I needed to go home.
>
> Q. Got you. So, they managed their own time as far as how late they might stay after?
>
> A. Absolutely.

(Williams Dep. 95-96:22-25, 1-11). CoRE Recruiters did not need to receive any approval to work more than 40 hours in one week. (Schiff Dep. 58:5-8).

CoRE Recruiters would regularly arrive prior to their scheduled shifts to prep for the day. (Whitlow Dep. 36:7-18; Hardesty Dep. 112:2-18). CoRE Recruiters would also regularly return early from lunch or work through their scheduled one-hour lunches (Chipman Dep. 213: 22-25; Whitlow Dep. 41:8-42:7; Hardesty Dep. 111:23-25), stay after their assigned shifts (Chipman Dep. 213: 17-21; Whitlow Dep. 39:6-22), and work weekends (Chipman Dep. 123:17-23). As indicated by Buck Moffett's testimony above, the reasons for working hours outside of their scheduled shift included times in which a CoRE Recruiter is preparing for their day (Hardesty Dep. 112:7-18; Hickey Dep. 99:7-15), continuing beyond their shift to field candidate calls (Chipman Dep. 213:17-214:6), covering for another team member (Chipman Dep. 216:1-14), special assignments such as assisting with training (Whitlow Dep. 39:23-40:2; 42:23-43:4), or being directed by their team supervisor or manager to work on an assignment (Williams Dep. 96:12-19).

As confirmed by Buck Moffett's testimony above and the testimony of Kroger Manager Danielle Williams, the extensive amount of overtime worked by CoRE Recruiters was permitted and/or required by Kroger management. Both the scheduled hours and hours CoRE Recruiters worked outside their schedule have resulted in hours worked well in excess of forty (40) hours per week. Despite working well in excess of forty (40) hours per week, CoRE Recruiters were not compensated for any overtime worked until after December 1, 2016 when they were uniformly re-classified.

J. Kroger makes a uniform decision to reclassify its CoRE Recruiters to FLSA Non-Exempt on December 1, 2016.

On or about December 1, 2016, Kroger uniformly changed the status of its CoRE to "nonexempt." (Schiff Dep. 54:10-25). All CoRE Recruiters are now being paid on an hourly basis, which was determined for all CoRE Recruiters based on their salary divided by 40 hours a week, 52 weeks of the year. (*Id.* at 56:8-22). All CoRE Recruiters now clock in and out using a "Kronos" time keeping system to track their hours. (*Id.* at 56-57:23-25, 1-20).

III. LAW AND ARGUMENT

As stated above, Courts routinely certify misclassification where the central question of whether employees were wrongfully classified as exempt is common to the class. *See Swigart*, 288 F.R.D. at 184. The Named Plaintiffs and class they seek to represent fall squarely within this line of cases—by being uniformly misclassified as "FLSA exempt" pursuant to a common job description and common "vision" by Buck Moffet, the CoRe Recruiters were affected by a general policy of Defendant Kroger, and thus deprived of overtime compensation.

A. Legal Standard: Fed. R. Civ. P. 23(a) and 23(b)(3)

Fed. R. Civ. P. 23 governs class lawsuits, including Ohio state claims under the OMFWSA for overtime compensation. *See Laichev v. JBM, Inc.* 269 F.R.D. 633, 636 (S.D. Ohio 2008) ("Plaintiff may maintain a class action for violations of § 4111.10 under Fed. R. Civ. P. 23."). At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action. Fed. R. Civ. P. 23(c)(1)(A).

Pursuant to Fed. R. Civ. P. 23(a), one or more members of a class may sue or be sued as representative parties of all members if:

(1) The class is so numerous that joinder of all members is impracticable [numerosity];

(2) There are questions of law or fact common to the class [commonality];

(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class [typicality]; and

(4) The representative parties will fairly and adequately protect the interests of the class [adequacy of representation].

Where the four prerequisites of Rule 23(a) are met, the class action may be maintained if the class meets one of the following 3 requirements set forth in Fed. R. Civ. P. 23(b):

(1) Prosecuting separate actions by or against individual class members would create a risk of:

   (A) Inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

   (B) Adjudications with respect to individual class members that, as a practical matter, would be dispositive to the interests of the other members not parties to the individuals adjudications or would substantially impair or impede their ability to protect their interests;

(2) The party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) The court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) The class members' interests in individually controlling the prosecution or defense of separate actions;

(B) The extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) The likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b). An order that certifies the class must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

A party seeking certification of a class action "must affirmatively demonstrate his compliance with [Rule 23]." *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct 2541, 2551, 180 L.Ed.2d 374 (2011). Certification is proper if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* While the Supreme Court has noted that such analysis may "entail some overlap with the merits of the plaintiff's underlying claim," *Id.* at 2541, such inquiry "grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen, Inc. v. Connecticut ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195, 185 L. Ed.2d 308 (2013); *See also Glazer v. Whirlpool Corp.* (*In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*), 722 F.3d 838, 851 (6th Cir.2013) ("[D]istrict courts may not turn class certification proceedings into a dress rehearsal for the trial on the merits."). Rather, merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied. *Id.* Moreover, in considering the Rule 23 requirements, "[w]hen there is a question as to whether certification is appropriate, the Court should give the benefit of the doubt to approving the class." *Swigart v. Fifth Third Bank*, 288 F.R.D. at 182.

B. Named Plaintiffs and the class they seek to represent meet the standards of Fed. R. Civ. P. 23(a) and 23(b)(3)

Plaintiffs meet the standard for class certification under Fed. R. Civ. P. 23 with respect to their Ohio wage claims.[6] In overtime misclassification cases such as this one, class certification with respect to state wage claims is the logical next step where a determination as to whether the Named Plaintiffs were misclassified will ultimately be determinative of liability with respect to all class members. Such is the case here. There are at least 180 potential class members in the Named Plaintiff's case who are current or former employees of CoRE. All class members worked in the same position, at the same location, under the same compensation plan, are subject to the same employer policies and procedures, were classified as exempt under the same job description, are subject to the same defenses, and all seek the same type of recovery (payment of unpaid overtime). Thus, Plaintiffs meet the implicit and explicit requirements of Rule 23(a) (numerosity, commonality, typicality, adequacy of representation), and one of the three additional requirements under Rule 23(b)(3) (common questions of law/fact predominate, and class action is superior to other available methods).

1. The Named Plaintiffs satisfy the two Implicit Requirements of Rule 23

Prior to analyzing the Rule 23(a) prerequisites, this Court must first determine that the proposed class is sufficiently defined and that the named plaintiffs are members of the class. *See*

[6] Because the OMFWSA's opt-in requirements do not apply to overtime violations, Fed. R. Civ. P. 23 applies to the Named Plaintiff's state claims.

Tedrow v. Cowles, S.D.Ohio No. 2:06-cv-637, 2007 U.S. Dist. LEXIS 67391, at *13 (Sep. 12, 2007)("A threshold issue that is implicit in a Rule 23 inquiry is that a court conclude that the named plaintiffs seeking certification propose an identifiable, unambiguous class in which they are members.") and *Bentley v. Honeywell Intern., Inc.*, 223 F.R.D. 471, 477 (S.D. Ohio 2004). "[T]he class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537-538 (6th Cir.2012). "While class definitions are obviously individualized to the given case, important elements of defining a class include: (1) specifying the particular group at a particular time and location who were harmed in a particular way; and (2) defining the class such that a court can ascertain its membership in some objective manner." *Laichev*, 269 F.R.D. at 639 (citing *McGee v. East Ohio Gas Co.*, 200 F.R.D. 382, 387 (S.D. Ohio 2001).

As stated in Section II above, the Named Plaintiffs propose the following definition of the Ohio class:

> All employees classified as recruiters, who; i) were employed at Kroger's Center of Recruiting Excellence ("CoRE") in Blue Ash, Ohio, at any time from the beginning of the CoRE's operations in 2014 to December 1, 2016, and ii) worked in excess of forty (40) hours during any given workweek.

This definition is sufficient for the Court to determine an individual's membership in the class, as it limits membership to individuals who were employed at Kroger's CoRE—a single location in Blue Ash, Ohio—and to a particular time period—the start of the time period when Kroger hired its first CoRE Recruiter to the time period in which the class members were re-classified to "FLSA Nonexempt." Moreover, determining class membership will be administratively feasible. Kroger has already provided a "putative class list" and "supplemental" list for all class members of the

FLSA collective action, and ostensibly should have all employment records, including names, dates of employment, and job titles of individuals who are potential members of this class.

Further, Plaintiffs Joseph Hardesty, Derek Chipman, and Madeline Hickey are all members of this proposed class. Joseph Hardesty was employed as a CoRE Recruiter from February 23, 2015 through September 14, 2015. *See* **Exhibit 1** to Smith Affidavit. Derek Chipman was employed as a CoRE Recruiter from February 23, 2015 through August 6, 2015. *Id*. Madeline Hickey was employed as a CoRE Recruiter from October 31, 2014 through April 1, 2015. *Id*. Each of the Named Plaintiffs also have testified that they regularly worked in excess of forty (40) hours per week, and were never paid overtime for their work. As such, all Named Plaintiffs fit within the class definition and are members of the proposed class.

2. Rule 23(a) Prerequisites—Numerosity, Commonality, Typicality, and Adequacy of Representation

Once the class has been sufficiently defined and it is determined that Plaintiffs are members of the class, the Court may then proceed to the analysis of the four Rule 23(a) prerequisites of numerosity, commonality, typicality, and adequacy of representation. Here, the Named Plaintiffs meet all the four prerequisites under Rule 23(a).

a. Numerosity

The first Rule 23(a) prerequisite requires that a class be "so numerous that joinder of all members is ***impracticable***." Fed. R. Civ. P. 23(a)(1)(emphasis added). This rule does not require a plaintiff to "establish that it is ***impossible*** to join all members of the proposed class. *Day v. NLO, Inc.*, 144 F.R.D. 330, 333 (S.D. Ohio 1991). Rather, a plaintiff need only show that joinder of all members "would be difficult and inconvenient." *Day*, 144 F.R.D. at 333.

Further, there is no strict numerical test necessary to meet the numerosity requirement.[7] *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006). Indeed, "[t]he numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *In re Foundry Resins Antitrust Litig*., 242 F.R.D. 393, 403 (S.D.Ohio 2007)(citing *Golden v. City of* Columbus, 404 F.3d 950, 965-66).

With particular respect to actions for unpaid overtime, this Court has deemed potential class members' fears of adverse where such individuals are current employees of the defendant-employer as a compelling reason for finding joinder impracticable. *See, Swigart v. Fifth Third*, 288 F.R.D. at 183 ("In employment class actions like this one, a class member's potential fear of retaliation is an important consideration in deciding whether joinder is impracticable and thus whether the numerosity requirement is satisfied."); *See also Ansoumana v. Gristede's Operating Corp.*, 20 F.R.D. 81, 85-86 (S.D.N.Y. 2001) (finding in a hybrid action that plaintiffs satisfied numerosity because, among other reasons, they "would not be likely to file individual suits [due to]…their fear of reprisals.").

Here, Kroger employs approximately 120 or more CoRE Recruiters at any given time. Schiff Dep. at 20-21:24-25, 1-5. While this number describes the number of *current* CoRE Recruiters, the full class is comprised of over 180 CoRE Recruiters, based upon the previous putative class list provided by Kroger. *See* **Exhibit 1** of Smith Affidavit. These numbers far exceed the typical amounts this Court and others deem impracticable for joinder. *See, e.g., Laichev*, 269 F.R.D. at 640 (joinder of at least 90 individuals lawsuits--which could include in reality include many more--deemed impractical); *Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 105

[7] Although it is far from an absolute rule, it is generally accepted that a class of more than 40 members is sufficient to meet the numerosity requirement. *Krieger v. Gast*, 197 F.R.D. 310, 314 (E.D. Mich. 2000) *citing Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2nd Cir. 1995) ("numerosity is presumed at a level of 40 members.").

F.R.D. 506, 508 (S.D. Ohio 1985)(finding that independent subclasses consisting of 87 and 23 investors each met the numerosity requirement, stating there was "no reason to encumber the judicial system with 23 consolidated lawsuits when one will do."); *Krieger*, 197 F.R.D. at 313-314 (finding joinder of "over 50 GMC minority shareholders" would be impracticable). To require each of these individuals to bring their own lawsuits for overtime wages would be utterly impracticable, and frankly unnecessary where a class action would sufficiently resolve the claims.

Moreover, as indicated above there are still a substantial number of current employees at CoRE who have been deprived of overtime pay. Each of these current employees have a reasonable fear of an adverse work impact which is reasonably likely to deter them from opting in to this lawsuit, or bringing their own individual suit. At least one FLSA Opt-In Class Member, Kelly Rutledge, has testified that she knows of recruiters who feared retaliation for joining the FLSA action. Rutledge Dep. 146:10-24. As such, a refusal to allow these employees to be members of an opt-out class would effectively chill their rights to pursue overtime wages owed to them under Ohio law.

Plaintiffs' proposed class satisfies the numerosity requirements of Rule 23(a)(1), such that joinder of all members would be impracticable.

b. Commonality

Rule 23(a)(2) states that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if…there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality requires a plaintiff to demonstrate that the class members "have suffered the same injury." *Dukes*, 564 U.S. at 349-350. Specifically, the plaintiff's claims "must depend upon a common contention . . . of such a nature that it is capable of classwide resolution . . . which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *In re Whirlpool Corp. Front-Loading Washer Products Liabl. Litig.*, No 10-4188, 722 F.3d 838, 2013 U.S. App. LEXIS 14519 (6th Cir. 2013) citing *Dukes*, 564 U.S. at 350.

To be clear, commonality is not required on every question raised in a class action. Rather, *Rule 23 is satisfied when the legal question linking the class members is substantially related to the resolution of the litigation*. *Swigart*, 288 F.R.D. at 183 (emphasis added)(*citing DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995)). Moreover, plaintiffs satisfy the "commonality" requirement "when 'it is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue.'" *Laichev*, 269 F.R.D. at 640 (quoting *Bacon v. Honda of America Mfg., Inc.*, 370 F.3d 565, 570 (6th Cir. 2004)).

With particular respect to wage misclassification actions, commonality exists when "the members of the class have allegedly been affected by a general policy of the defendant, and the general policy is the focus of the litigation." *Laichev*, 269 F.R.D. at 640. Courts routinely certify misclassification cases as having such similar common questions. *Swigart*, 288 F.R.D. at 184 (citing decisions from multiple circuits which have certified class actions with respect to misclassification cases). This is because "the central question of whether the employees were wrongfully classified as exempt from overtime pay requirements is common to the class." *Id*.

Here, it is clear that Kroger engaged in a general policy decision affecting all CoRE Recruiters. Specifically, Kroger made a single uniform policy decision that CoRE Recruiters would be classified as "FLSA Exempt," meaning they would be paid on a salary basis and not entitled to overtime. This single decision was made by Buck Moffett, the prior CoRE General Manager, based upon a common corporate position profile applicable to all CoRE Recruiters, and an overall "vision" he had with respect to CoRE Recruiters' job duties. The decision was based upon the anticipated job duties of all CoRE Recruiters as a whole. Consistent with having one job description applicable to all CoRE Recruiters, CoRE Recruiters remained essentially interchangeable for purposes of performing their job duties.[8] Moffett Dep. 128:4-14. Even more telling is the fact that on December 1, 2016, *Kroger re-classified all CoRE Recruiters to "FLSA Non-Exempt," making yet another uniform policy determination as to the CoRE Recruiters*.

As such, there are multiple questions of law and fact common to Plaintiffs' proposed class, including:

- Whether Kroger has misclassified its CoRE Recruiters as exempt under the FLSA and OMFWSA;
- Whether CoRE Recruiters' primary duties meet the administrative exemption set forth in 29 CFR § 541.200-541.204;
- Whether Kroger's failure to pay overtime to its CoRE Recruiters was willful (for purposes of determining whether a third year of damages is appropriate).
- Whether Kroger's failure to pay overtime to its CoRE Recruiters was in good faith (for purposes of determining whether liquidated damages should be awarded).

c. Typicality

Rule 23(a)(3) requires that "the claims…of the representative parties be typical of the claims…of the class." A claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. *Hurt v. Commerce Energy, Inc.*, 2013 U.S. Dist. LEXIS 116383 at *12 (N.D. Ohio 2013) *citing Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6^{th} Cir. 2007).

Although commonality and typicality are separate requirements, the U.S. Supreme Court has noted that the factors "tend to merge." *Dukes*, 131 S. Ct. at 2551 n.5. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so inter-related that

[8] The CoRE Recruiters all worked in the same location, had a common job description, utilized the same Kroger-provided software, were provided the same orientation and training, utilized the same recruiting "script," were subject to the same policies and procedures including those set forth in the Kroger GO Handbook.

the interests of the class members will be fairly and adequately protected in their absence." *Id.* The requirement of typicality focuses on the conduct of a defendant and whether a proposed class representative has been injured by the same kind of conduct alleged against the defendant as other members of the proposed class. *Swigart*, 288 F.R.D. at 185. This is why a finding that commonality exists generally results in a finding that typicality also exists. *Id.* citing *Violette v. P.A. Days, Inc.*, 214 F.R.D. 207, 214 (S.D. Ohio 2003).

Here, the Named Plaintiffs' claims, and the defenses which Kroger asserts, are typical of the claims of the class and defenses which Kroger might assert against the class as a whole. As set forth above, the Named Plaintiffs' claims for overtime arise from Defendant's same course of conduct applicable to all class members: Defendant's general policy of classifying CoRE Recruiters as exempt from state and federal overtime pay requirements. Moreover, the Named Plaintiffs' job duties were also typical of other CoRE Recruiters: Joseph Hardesty worked during the same time period as the class, was subject to the same policies and procedures as other CoRE Recruiters, utilized the same screening and scheduling policies as other CoRE Recruiters, and regularly worked in excess of 40 hours per week. Derek Chipman and Madeline Hickey make the same claims.

As each Named Plaintiff states the same claim and seeks the same relief as the class they seek to represent, their claims are typical of the claims of the class for purposes of Rule 23(a)(3).

d. Adequacy of Representation

Rule 23(a)(4), the final Rule 23(a) prerequisite, requires the court to determine whether "the representative parties will fairly and adequately protect the interests of the class." This requirement calls for a two-pronged review: "(1) the representatives must have common interests with unnamed members of the class, and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel. *Hendricks v. Total Quality Logistics, LLC*, 292 F.R.D. 529, 542 (S.D. Ohio 2013).

i. Adequacy of Named Plaintiffs to represent the class

The adequacy inquiry under the first criterion "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Yost v. First Horizon Nat'l Corp.*, W.D.Tenn. No. 08-2293-STA-cgc, 2011 U.S. Dist. LEXIS 60000, at *43 (June 3, 2011) citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231, 2250-51, 138 L.Ed. 2d 689 (1997). A representative's interests are antagonistic to the interests of the members of the class when there is evidence that the representative plaintiffs appear unable to "vigorously prosecute the interests of the class." *Id.* However, "[b]ecause few people are ever identically situated, it is easy to paint an image of the class representative's interests as peripherally antagonistic to the class. That depiction does not make [a] plaintiff an inadequate representative." *In re Polyurethane Foam Antitrust Litig.*, N.D.Ohio No. 1:10 MD 2196, 2014 U.S. Dist. LEXIS 161020, at *30 (Apr. 9, 2014) *citing Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 429 (6th Cir.2012). A supposed conflict should doom class certification only if that conflict is "fundamental." *Id.*

Here, Joseph Hardesty, Derek Chipman, and Madeline Hickey are all adequate class representatives. Their claims are timely filed, they share the common questions of law and fact that are held by the class, and their claims are typical of the claims of the other class members (as stated in the previous section). The Named Plaintiffs assert no individual claims in this litigation which would impact their ability to adequately represent the class. Moreover, all three have submitted to both paper discovery and depositions in this action, and are prepared to continue representing the interests of the class at trial in this matter. As such, they are adequate representatives of the class they seek to represent.

ii. Adequacy of class counsel

The second standard of the Rule 23(a)(4) test requires that "counsel be competent and prepared to 'vigorously' represent the entire class." *Beard v. Dominion Homes Fin. Servs.*, S.D.Ohio No. 2:06-cv-00137, 2007 U.S. Dist. LEXIS 71469, at *17 (Sep. 26, 2007). Federal Rule of Civil Procedure 23(g), which complements Rule 23(a)(4)'s adequate representation requirement, delineates the considerations a court must and may consider when appointing class counsel. Rule 23(g)(1)(A) states that a court must consider:

> (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g); *See also Spine & Sports Chiropractic, Inc. v. Zirmed, Inc.*, W.D.Ky. No. 3:13-CV-00489-TBR, 2014 U.S. Dist. LEXIS 88562, at *48-49 (June 30, 2014). A court may also "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class . . ." Fed. R. Civ. P. 23(g)(1)(B).

The undersigned counsel will adequately represent the class. Counsel has expended significant effort, time, and expense investigating the present claims and in identifying claimants. *See* Affidavits of Counsel Peter A. Saba, Sharon J. Sobers, and Joshua M. Smith, attached as **Exhibits B-D**). The lead attorney, Peter A. Saba, has over 25 years of practice experience, and has represented both plaintiffs and defendants in prior class actions and other complex litigation, including a number of labor and employment claims, and including other cases before this Court. *Id*. Additionally, this case is staffed with two more attorneys. Ms. Sharon J. Sobers is a certified Labor and Employment Law specialist with more than 30 years of practice experience, and significant experience handling previous multidistrict class action litigation. *Id*. at ¶ 6. Mr. Joshua

M. Smith is an associate attorney working under Mr. Saba and Ms. Sobers, with nearly three years of practice experience, and particular experience handling labor and employment matters for both plaintiffs and defendants. *Id*. Counsel also has a significant support staff of paralegals and legal assistants prepared to handle this matter. Counsel is committed to adequately applying these and other resources to this case as necessary.

3. Rule 23(b)(3)—Question of Law or Fact Predominate, and Class Action is Superior to Other Available Methods

Once the prerequisites of Rule 23(a) are satisfied, an action may be maintained as a class action so long as it qualifies under any of the three conditions set forth in Rule 23(b). In this case, Plaintiffs seek class certification under Rule 23(b)(3), which permits certification when "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

a. Common questions predominate

The predominance inquiry under Rule 23(b)(3) is closely tied to the commonality requirement of Rule 23(a). *See Thomas v. Speedway Superamerica, LLC*, 2005 U.S. Dist. LEXIS 45286, at *37038 (S.D. Ohio 2005). The test "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 194 L. Ed.2d 124, 134, 136 S.Ct. 1036, 2016 U.S. LEXIS 2134 (March 22, 2016). When "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Id.*

The mere fact that questions peculiar to each individual member of the class action remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible. *Hurt*, 2013 U.S. Dist. LEXIS 116383 at *15 (citing *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988)). The Sixth Circuit in *Glazer*, for example, citing the Supreme Court's decision in *Amgen*, emphasized that the predominance inquiry need only focus on common ***questions*** that can be proved through evidence common to the class, and need not focus on whether each element of a case can be established by classwide proof. *Glazer v. Whirlpool Corp.*, 722 F.3d at 858 (citing *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds,* 133 S. Ct. 1184, 1196, 185 L. Ed.2d 308 (2013)).

Here, common questions of fact *and* law clearly predominate. As to the question of *fact*, Defendant has engaged in a common course of conduct which has led to the alleged harm to all class members: that Defendant enacted a general policy of misclassifying its CoRE Recruiters as exempt from state and federal overtime requirements, thus depriving all class members of overtime to which they are entitled. This policy clearly applies to all CoRE Recruiters, as Kroger concedes to making this determination as to the CoRE Recruiters as a whole. Further, Mr. Moffett, on behalf of Kroger, made this determination on the basis of a common job description applicable to all CoRE Recruiters and a common "vision" as to CoRE Recruiters' job duties. Beyond this, the CoRE Recruiters also followed the same Kroger policies and procedures, utilized the same Kroger-provided software, utilized the same phone systems, and were subject to the same Kroger standards. All of these factual questions predominate over any individualized inquiries.

As to the question of *law*, the common question which predominates is whether the treatment of CoRE Recruiters as exempt employees was legally permissible under the FLSA and Ohio law. The answer to this question is central to liability in this case, as all of Plaintiffs and the class members' damages arise from allegations that they were misclassified as exempt from overtime pay. Additionally, questions as to whether the good faith affirmative defense applies with respect to Defendant's incorrect decision to classify CoRE Recruiters as exempt. A decision as to this defense will affect all CoRE Recruiters entitlement to liquidated damages.

On numerous previous occasions, this Court has similarly found such common questions of law and fact to predominate. In *Swigart*, for example (a similar misclassification case under the FLSA and OMFWSA), this Court determined that there were numerous common questions of law and fact arising out of a defendant-employer's conduct to the class, making it an appropriate case for resolution by means of a class action. 288 F.R.D. at 186. Specifically, liability in the case turned on (1) whether the defendant acted in good faith reliance on, and in conformity with, a 2006 Opinion Letter from the Department of Labor; and (2) if not, whether the defendant-employer properly classified its employees as exempt administrative employees. *Id.* The court then held that those issues would be determined based on common proof, and thus common questions clearly predominated in the case. *Id.*

In *Laichev*, the court certified a class action under the OMFWSA in addition to conditionally certifying a collective action under the Fair Labor Standards Act. 269 F.R.D. at 633. The case involved technicians who repaired and installed DirecTV hardware who allegedly did not receive overtime pay despite working over 40 hours a week. *Id.* at 635. In certifying the class, Judge Barrett rejected the defendant's contention that too many individual questions existed as to class members, and instead found "there are clearly common questions that exist, *including whether the defendant failed to pay overtime wages to the class and how the defendant's payroll practice was instituted with respect to overtime*. Plaintiffs allege a common course of conduct by

Defendant which has led to the alleged harm to the class members." *Id.* at 641 (emphasis added). Both the FLSA and OMFWSA actions were certified. *Id.*

Finally, this Court in *Hendricks* also certified a class of employees which were classified as exempt. 292 F.R.D. at 543. The case involved Logistics Account Executives and trainees at a freight brokerage firm, who claimed to be misclassified as exempt and denied overtime pay under the FLSA and Ohio Wage Act. *Id.* at 532. The defendant claimed that the employees were exempt from overtime because they perform administrative or executive duties, or because they are highly-compensated employees. *Id.* In certifying the class action with respect to the plaintiffs' state claims, the court found that:

> There are numerous common questions of law and fact arising out of TQL's conduct to the LAET subclass making this an appropriate case for resolution by means of a class action. The common contentions with respect to the LAET subclass are whether LAETs primarily perform work directly related to the management or general business operations of TQL or TQL's customers and whether LAET's exercise discretion and independent judgment with respect to matters of significance. These issues can be determined based on common proof, and common questions clearly predominate in this case.

Id. at 543.

The above-cited cases (and others) make clear that "[c]ourts routinely certify misclassification cases with common questions because the central question of whether the employees were wrongfully classified as exempt from overtime pay requirements is common to the class." *Swigart*, 288 F.R.D. 184. Here, clearly the central question is whether the CoRE Recruiters were properly classified as exempt from the FLSA and OMFWSA. The answer to this question will determine liability to the class as a whole, because class members all perform the same job duties and are subject to the same Kroger policies. Along these same lines, other similar questions are whether Defendant misclassification of the CoRE Recruiters was in good faith; and whether their misclassification of the class members was willful. The resolution of these questions, in particular the question of whether CoRE Recruiters are properly classified as exempt, will be based on common proof, and will determine liability with respect to all class members. As such, these common questions predominate.

b. Class Action is Superior

Rule 23(b)(3) lists four factors to be considered in determining the superiority of proceeding as a class action compared to other methods of adjudication:

(A) The interests of the members of the class in individually controlling the prosecution of separate actions;

(B) The extent and nature of other pending litigation about the controversy by members of the class;

(C) The desirability of concentrating the litigation in a particular forum; and

(D) The difficulties likely to be encountered in management of the class action.

Fed. R. Civ. P. 23(b)(3)(A)-(D). Each of these factors weigh in favor of certification in this case.

First, the putative class members have no significant interest in individually controlling the prosecution of separate actions. In fact, many class members—particularly those who had a short employment period at Kroger, or those who worked a relatively low number of overtime hours—may have relatively small individual damages such that the costs of pursuing the matter significantly impairs the ability of individual plaintiffs to proceed on a case-by-case basis. *See Laichev*, 269 F.R.D. at 642. Further, some class members, particularly those which were employed at the start of CoRE's operations, are coming upon the statute of limitations for bringing their state and federal overtime claims (2 years; 3 years if violation was willful). These individuals have a particular interest in becoming a part of the class action, as they will lose all rights to bring an individual action in the ensuing months. *See Swigart*, 288 F.R.D. 288 (finding no evidence that putative class members have any interest in maintaining separate actions, particularly considering the fact that the claims of all plaintiffs will be completely extinguished by an upcoming statute of limitations).

Second (and third), it is desirable to concentrate the claims in this Court as there is no record of other similar litigation pending in Ohio, and Defendant, CoRE, and the vast majority of the putative class members are located in this district. *See Swigart*, 288 F.R.D. at 186-187.

Finally, there will be little to no difficulty encountered in managing this class action, as all putative class members worked at one location (Blue Ash, Ohio), and the class size is limited and manageable (roughly 180-200 members).

C. Notice and "Request for Exclusion" forms for Rule 23 Class should be adopted

Once the Court has determined that class certification is proper, the Court must issue an order defining the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g). The Named Plaintiffs request that this Order be provided with the class definition set forth above, and on the Ohio claims set forth in the Named Plaintiffs' Complaint.

With respect to classes certified under Fed. R. Civ. P. 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). This notice must clearly and concisely state in plain, easily understood language:

(i) The nature of the action;
(ii) The definition of the class certified;
(iii) The class claims, issues, or defenses;
(iv) That a class member may enter an appearance through an attorney if the member so desires;
(v) That the court will exclude from the class any member who requests an exclusion;
(vi) The time and manner for requesting exclusion; and
(vii) The binding effect of a class judgment on member under Rule 23(c)(3).

Id.

Here, the Named Plaintiffs have provided a proposed notice to be sent to potential class members, attached as **Exhibit M**. This notice is based on the form of notice endorsed by the Federal Judicial Center. A proposed Exclusion form is attached to the Notice, providing members of the Rule 23(b) class an opportunity to opt-out. Additionally, the Named Plaintiffs have attached a proposed cover letter to be included with the notice, explaining the purpose of receiving the notice, and the difference between this notice and the previous notice sent to class members of the FLSA collective action.

IV. CONCLUSION

This wage misclassification class action falls within the type of actions routinely and appropriately certified by the court. Because the Named Plaintiffs have met the standards set forth in Fed. R. Civ. P. 23(a) and 23(b)(3), the Named Plaintiffs respectfully request that this Court certify this action under Rule 23(b)(3), approve the submission of the proposed notice to class members, and order that Defendant Kroger supplement its original production of names/addresses and other relevant information regarding Kroger's CoRE Recruiters employed from the beginning of its operations in 2014 to December 1, 2016, so that the attached Notices can be sent to appropriate potential class members.

Respectfully submitted,

/s/ Peter A. Saba
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was served electronically through the District Court's electronic case filing system upon David K. Montgomery, Esq., and Ryan M. Martin, Esq., Jackson Lewis P.C., PNC Center, 26th Floor, 201 East Fifth Street, Cincinnati, Ohio 45202, this 9th day of June, 2017.

/s/ Peter A. Saba
Peter A. Saba (0055535)

EXHIBIT LIST

Exhibit A
Affidavit of Joshua M. Smith, Esq. in Support of Named Plaintiffs' Motion for Certification Under Fed. R. Civ. P. 23(b)(3), with supporting Exhibits 1-18

Exhibit B
Affidavit of Peter A. Saba, Esq.

Exhibit C
Affidavit of Sharon J. Sobers, Esq.

Exhibit D
Affidavit of Joshua M. Smith, Esq.

Exhibit E
Prior Declaration of Joseph Hardesty in Support of Motion to Conditionally Certify a FLSA Collective Action

Exhibit F
Prior Declaration of Derek Chipman in Support of Motion to Conditionally Certify a FLSA Collective Action

Exhibit G
Prior Declaration of Madeline Hickey in Support of Motion to Conditionally Certify a FLSA Collective Action

Exhibit H
Prior Declaration of Kimberly Burchett in Support of Motion to Conditionally Certify a FLSA Collective Action

Exhibit I
Prior Declaration of Amanda Gayhart in Support of Motion to Conditionally Certify a FLSA Collective Action

Exhibit J
Prior Declaration of Robert Michael Kovatch in Support of Motion to Conditionally Certify a FLSA Collective Action

Exhibit K
Prior Declaration of Tinashe Ckris Matibiri in Support of Motion to Conditionally Certify a FLSA Collective Action

Exhibit L
Prior Declaration of Christian Bradley in Support of Motion to Conditionally Certify a FLSA Collective Action

Exhibit M
Proposed Notice Ohio Rule 23(b) Class Action (with attached Opt-Out Exclusion Form and cover letter to class members)